Office Supreme Court
NOV 25 19
CHARLES ELMORE

FILE COPY

No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors	5
Summary of argument	5
Argument:	
I. Preliminary statement	6
II. The respondent was not entitled to recover on his original policy since he did not and could not surrender his converted policy	14
Conclusion	23
Appendix	24

CITATIONS

Cases:	
Anderson v. *United States*, 36 F. (2d) 45	11
Birmingham v. *United States*, 4 F. (2d) 508	21
Blackburn v. *Merchants Life Insurance Co.*, 90 Cal. App. 362	15
Blume v. *Pittsburg Life and Trust Co.*, 263 Ill. 160	16, 23
Brown v. *Gibson*, 107 Va. 383	16
Collman v. *Assurance Society*, 133 Iowa 177	23
Coffey v. *Universal Life Insurance Co.*, 7 Fed. 301	23
Crawford v. *United States*, 40 F. (2d) 199	9, 21
Deane v. *Caldwell*, 127 Mass. 242	15
Duggan v. *United States*, 36 F. (2d) 804	9
Franks v. *United States*, 43 F. (2d) 455	9
Goodhue v. *Hartford Fire Insurance Co.*, 175 Mass. 187	16
Green v. *Insurance Co.*, 112 Kan. 50	15
Herrig v. *United States*, 53 F. (2d) 327	22
Hilliard v. *Wisconsin Life Insurance Co.*, 137 Wis. 208	23
Jordan v. *United States*, 36 F. (2d) 43	8, 11
Knapp v. *Homeopathic Mutual Life Insurance Co.*, 117 U. S. 411	22
Kothe v. *Phoenix Mutual Life Insurance Co.*, 269 Mass. 148	23
Long v. *United States*, 45 F (2d) 590	22

Cases—Continued.

	Page
Matter of Attorney General v. *Continental Life Insurance Co.*, 93 N. Y. 70	23
McCormick v. *The Travelers Insurance Co.*, 215 Mo. App. 258	15
McLaughlin v. *Equitable Life Assurance Society*, 38 Nebr. 725	16, 23
Meadows v. *United States*, 281 U. S. 271	21
Nolander v. *Burns*, 48 Minn. 13	16
Quirk v. *United States*, 45 F. (2d) 631	22
Schumacher v. *Manhattan Life Insurance Co.*, Fed. Cas. No. 12, 490	23
Sheerer v. *Manhattan Life Insurance Co.*, 20 Fed. 886	23
Silva v. *Bair*, 141 Cal. 599	15
Sprencel v. *United States*, 47 F. (2d) 501	22
Stayner v. *Equitable Life Assurance Society*, 22 Misc. Rep. 53	23
Stevens v. *United States*, 29 F. (2d) 904	8
United States v. *Acker*, 35 F. (2d) 646	9
United States v. *Allen*, 33 F. (2d) 888	8
United States v. *Andrews*, 43 F. (2d) 80	9, 21
United States v. *Banks*, 36 F. (2d) 47	10
United States v. *Barker*, 36 F. (2d) 55	8
United States v. *Buzard*, 33 F. (2d) 883	8
United States v. *Cross*, 33 F. (2d) 887	8
United States v. *Crowell*, 48 F. (2d) 475	22
United States v. *Golden*, 34 F. (2d) 367)	9
United States v. *Jensen*, 36 F. (2d) 47	10
United States v. *Kusnierz*, 33 F. (2d) 887	8
United States v. *Loveland*, 25 F. (2d) 447	21
United States v. *Schweppe*, 38 F. (2d) 595	9
United States v. *Stamey*, 48 F. (2d) 150	22
United States v. *Worley*, 281 U. S. 339	20
Universal Life Insurance Co. v. *Devore*, 88 Va. 778	23
Watson v. *United States*, 45 F. (2d) 589	22
Wells v. *Vermont Life Insurance Co.*, 28 Ind. App. 620	16, 23
White v. *United States*, 270 U. S. 175	20
Woolfolk v. *United States*, 44 F. (2d) 701	9

Statutes:

Act of August 9, 1921, c. 57, 42 Stat. 157	8
Act of March 4, 1923, c. 291, 42 Stat. 1527	8
Act of May 29, 1928, c. 875, 45 Stat. 970 (U. S. C. Sup. V, Title 38, Sec. 512 (a)	18
Act of July 3, 1930, c. 849, Sec. 24, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518)	2
War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 409, as amended—	
Sec. 400	6
Sec. 404	6
Sec. 411	7

Statutes—Continued. Page
World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, as amended—
Sec. 300 (U. S. C., Title 38, Sec. 511) 6
Sec. 301 (U. S. C., Sup. V, Title 38, Sec. 512) 6
Sec. 304 (U. S. C., Title 38, Sec. 515) 6
Sec. 307 (U. S. C., Title 38, Sec. 518) 8
Sec. 307, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518) 2
Sec. 310 (U. S. C. Sup. V, Title 38, Sec. 512 (a)) 18
Miscellaneous:
Joyce, The Law of Insurance, 2d Ed., Sec. 1634 15
31 Ops. A. G. 534 7
32 Ops. A. G. 379 7
Congressional Record, Vol. 72, 71st Cong., 2d sess 13
Hearings before a subcommittee of the Senate Committee on Finance on H. R. 10381, 71st Cong., 2d Sess., on May 1, 2, and 5, 1930 12, 13
Sen. Rept. No. 1128, 71st Cong., 2d sess 11
Webster's New International Dictionary 15
Williston on Contracts, Secs. 1876–1878 15

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 191

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 53) is reported in 57 F. (2) 488. While the District Court rendered no formal opinion, its views on the question presented stated upon the overruling of the Government's motion for a non-suit, appear at R. 35–36.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1932. (R. 58.) The petition for certiorari was filed July 1, 1932, and granted October 10, 1932. (R. 59.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the holder of a lapsed policy of war-risk term insurance reinstates and converts his insurance into an ordinary life policy and thereafter surrenders this policy upon payment of its cash surrender value, is he entitled, under Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, to recover upon the original term policy for total and permanent disability occurring during the life of such policy, even though unable to surrender the converted policy?

STATUTE INVOLVED

Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518) provides:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: *Provided*, That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract

or policy: *Provided further*, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

STATEMENT

This is an action against the United States to recover the monthly installments alleged to have accrued under the terms of a war-risk insurance policy by reason of total and permanent disability occurring during the life of such policy. The essential facts are not in dispute, and, as disclosed by the pleadings and testimony, are as follows:

Respondent enlisted in the Army on or about March 29, 1918, and was discharged on January 16, 1919. (R. 2, 30.) While in the service he applied for and was granted a war-risk insurance policy in the sum of $10,000, on which the premiums were paid to and including January, 1919 (R. 2, 30, 33), when the policy lapsed for nonpayment of premiums. On March 1, 1920, this policy was reinstated and converted into an ordinary life policy, upon which petitioner paid the premiums to and including February, 1921. (R. 5–6, 30, 33, 37.) On February 28, 1921, respondent surrendered $5,000 of this insurance for its cash surrender value, which amounted to $45.20. (R. 6, 30–31, 32–33.) The remaining $5,000 was surrendered on December 29, 1921, for its cash surrender value of $18.30. (R. 6, 31, 32–33.)

The case was tried before a jury. (R. 11.) At the close of respondent's evidence, the Government moved for a nonsuit upon the ground, among others

not now material, "that the plaintiff having reinstated and converted the entire $10,000 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire converted policy and accepting its cash surrender value, is not in a position to comply with the Statute [Section 307 World War Veterans' Act, as amended by the Act of July 3, 1930, *supra*, p. 2], and, therefore, is precluded from recovering upon his term insurance policy." The District Court overruled this motion. (R. 35–36.) The Government excepted to this ruling (R. 36), and at the close of the evidence moved for a directed verdict upon the same ground. (R. 37.) This motion was denied and an exception taken. (R. 37.)

The case went to the jury upon the sole issue whether the respondent became totally and permanently disabled while his original policy was in force. (R. 39.) The jury returned a verdict for the respondent, in which they found that "he became totally and permanently disabled on the 29 day of September, 1918." (R. 14.) Judgment was accordingly entered for the respondent for the monthly installments of insurance which remained unpaid as of June 26, 1931, the date of the verdict. (R. 15–17.) Upon appeal by the United States, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (R. 53–58.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

1. In holding that respondent was entitled to recover upon his original policy despite the fact that several years prior to filing suit he had surrendered his converted policy for its full surrender value.

2. In holding that respondent was entitled to recover upon his original policy even though he was not in a position, as required by Section 307 of the World War Veterans' Act of 1924, as amended July 3, 1930, to surrender his subsequent converted policy.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

This case involves the construction of Section 307 of the World War Veterans' Act, as amended by Section 24 of the Act of July 3, 1930, p. 2, *supra*. The legislative history of Section 24 of the Act of July 3, 1930, and the setting in which it was enacted are set forth in a Preliminary Statement to the Argument, pp. 6–13, *infra*.

Section 307, as amended, entitles a veteran to recover on his original policy of term insurance if he establishes that he became permanently and totally disabled while that policy was in force, but such recovery is expressly conditioned upon the surrender of any subsequent policy issued to him. If a lapsed term policy is reinstated, converted, and thereafter surrendered for its cash surrender value, the former holder thereof in a suit on his original policy is unable

to comply with the requirement of Section 307, as the converted policy was extingusihed by its surrender for its cash value. Section 307 permits the veteran to sue on either his original policy or his subsequent converted policy, but he can not have the benefit of *both* policies. Payment to the respondent of the cash surrender value of his converted policy constituted full performance by the Government and extinguished its obligations. Since the respondent has received performance and benefit of the converted policy he can not recover on his original term policy.

ARGUMENT

I

PRELIMINARY STATEMENT

Section 400 of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 409, which subsequently became Section 300 of the World War Veterans' Act of June 7, 1924 (U. S. C., Title 38, Sec. 511), provided for the granting to members of the armed forces of insurance "against death or total permanent disability." Section 404 provided that the insurance so granted should be yearly renewable term insurance during the war and thereafter until converted. By Section 301 of the World War Veterans' Act, as amended (U. S. C., Sup. V, Title 38, Sec. 512), it was provided that all term insurance, with exceptions not here material, should not later than July 2, 1927, be converted into various standard forms of insurance. By Section 304 of that Act, as amended

(U. S. C., Title 38, Sec. 515), provision was made for the reinstatement of lapsed term insurance or converted insurance upon the condition, among others, that the applicant during his lifetime "submits proof satisfactory to the director showing that he is not totally and permanently disabled."

At an early date it was ruled by the Attorney General that the statute contemplated "a contract of insurance against something that may happen and not of indemnity for something which has already happened," and that the Veterans' Bureau (now the Veterans' Administration) was unauthorized to grant insurance upon an application made after total and permanent disability had been sustained. 31 Ops. A. G. 534; 32 Ops. A. G. 379. But because of the great difficulties attendant upon the determination of the question whether a particular individual is totally and permanently disabled, many policies were either issued, reinstated, or converted by the Bureau at a time when, as was subsequently determined, the insured was totally and permanently disabled. This situation gave rise to perplexing legal problems upon which much difference of opinion arose in the lower Federal courts.

Usually the questions thus arising were determined by the courts in connection with the so-called incontestability provisions of the statute. The original War Risk Insurance Act contained no provision relating to the incontestability of policies of insurance, but by Section 411, added to the Act by the

amendment of August 9, 1921, c. 57, 42 Stat. 157, it was provided that policies of war risk insurance "shall be incontestable after six months from date of issuance or reinstatement, except for fraud or nonpayment of premiums." This section was amended by the Act of March 4, 1923, c. 291, 42 Stat. 1527, to provide that such policies shall be incontestable "after the insurance has been in force six months from the date of issuance, or reinstatement, except for fraud or nonpayment of premiums." [1] Thus amended Section 411 of the War Risk Insurance Act was reenacted as Section 307 of the World War Veterans' Act of June 7, 1924 (U. S. C., Title 38, Sec. 518).

Cases frequently arose in the Bureau and before the courts where the veteran had allowed his original term insurance to lapse, had thereafter reinstated it, or reinstated and converted it, and subsequently had brought suit, alleging that he became totally and permanently disabled prior to the lapse of his original policy and was entitled to recover thereon. In numerous such cases it was held that the veteran could not recover. *Stevens* v. *United States*, 29 F. (2d) 904 (C. C. A. 8th); *United States* v. *Buzard*, 33 F. (2d) 883 (C. C. A. 9th); *United States* v. *Kusnierz*, 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Cross*, 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Allen*, 33 F. (2d) 888 (C. C. A. 9th). See also *United States*

[1] For a discussion of the legislative purpose underlying this amendment, see *Jordan* v. *United States*, 36 F. (2d) 43, 44–45 (C. C. A. 9th).

v. *Barker*, 36 F. (2d) 556 (C. C. A. 9th); *Duggan* v. *United States*, 36 F. (2d) 804 (Minn.); *Franks* v. *United States*, 43 F. (2d) 455 (Ore.). The bases for these decisions were not uniform. In the *Stevens case* the decision was rested upon estoppel by contract, i. e., the parties in executing the reinstated contract having assumed as the basis of their negotiations that the insured was not permanently and totally disabled, they were thereafter estopped to deny that fact. In the *Buzard case* the doctrine relied upon by the court was somewhat similar to that of an accord and satisfaction, where the parties "being in doubt as to their rights and obligations, make a binding adjustment by mutual agreement." In the *Cross case* the court made no distinction between a case where the policy had been reinstated and converted and the case where there was only a conversion. In the *Allen*, *Buzard*, and *Cross cases* the Circuit Court of Appeals for the Ninth Circuit stated that a contrary result might have been reached if the reinstatement had been rescinded for "fraud or mistake."

Other courts in situations substantially the same as those involved in the cases above cited allowed recovery on the original policy. *United States* v. *Golden*, 34 F. (2d) 367 (C. C. A. 10th); *United States* v. *Acker*, 35 F. (2d) 646 (C. C. A. 5th); *United States* v. *Schweppe*, 38 F. (2d) 595 (C. C. A. 8th). See *Woolfolk* v. *United States*, 44 F. (2d) 701, 702 (C. C. A. 9th); cf. *Crawford* v. *United States*, 40 F. (2d) 199 (C. C. A. 2d); *United States* v. *Andrews*, 43 F. (2d)

80 (C. C. A. 10th). Here again the bases of decision were not uniform. In the *Golden case*, which involved only a subsequent conversion of the original term insurance, the court held that the doctrine of estoppel was not applicable because the original contract had been converted as the result of a mutual mistake of fact. The court expressly differentiated between the case where there was both a reinstatement and conversion and the case where there was only a conversion, on the ground that under the statute reinstatement could only be granted upon proof by the veteran that he was not then totally and permanently disabled. In the *Acker case* recovery on the original policy was apparently allowed on the grounds that the statute did not permit or authorize the conversion of term insurance which at the time of application for reinstatement had already matured, that a reinstatement under such circumstances was invalid and therefore had no effect upon the claimant's rights under his original policy.

A closely similar problem arose where the insured sought to recover on the reinstated policy and was met by the defense that he had become totally and permanently disabled prior to the reinstatement. In this situation the Circuit Court of Appeals for the Ninth Circuit, resting its decision on the incontestability provisions of the statute, denied recovery. *United States* v. *Jensen*, and *United States* v. *Banks*, 36 F. (2d) 47. A like conclusion was reached by the same court in cases where the total and permanent

disability had occurred prior to the issuance of the original policy. *Jordan* v. *United States*, 36 F. (2d) 43; *Anderson* v. *United States*, 36 F. (2d) 45.

It was with the authorities in this state that Congress, by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001, amended Section 307 of the World War Veterans' Act to read as set forth at p. 2, *supra*. With respect to this amendment the report of the Senate Committee on Finance states as follows (Sen. Rept. No. 1128, 71st Cong., 2d Sess.):

> Section 24 amends section 307, which relates to the incontestability of insurance contracts. The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts where they were not applied for within the time limit required, where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, or for any other reasons except those specifically mentioned in the statute. It is appreciated that this is a broad provision, but it was felt that it was necessary in order to do justice to the veterans, to place this insurance on a parity with commercial insurance companies from a stability standpoint and to overcome decisions of the Comptroller General which practically nullify the section as it now

exists.[2] Further provision is made permitting the insured to elect after a reinstatement or conversion to go back to some prior contract and claim rights thereunder; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. The purpose is to prohibit the raising of estoppel against the claimant either in or out of the courts because of his reinstatement or conversion of his insurance. Provision is also contained whereby suit may be brought either in the original action, or by alterna-

---

[2] In the hearings before a subcommittee of the Senate Committee on Finance, 71st Congress, 2d Session, on H. R. 10381 (a predecessor bill containing the same provision as the one here in question), held on May 1st, 2d, and 5th, 1930, the decision of the Comptroller General referred to in the above report was explained to the subcommittee by the Assistant to the Director as follows (pp. 90–91):

"Mr. ROBERTS. Mr Chairman, the present World War veterans' act of 1924, as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. We have followed that, and in all cases where the policy has remained in force for six months we have paid the claim, irrespective of the merits of it, unless there was fraud or failure to pay premiums. The only cases that have been excepted from that section of the act were where the man originally did not have the right to apply for the insurance, such as a man who was not in the military service, who erroneously made an application, and through an error it was accepted. However, under date of January 16, 1930, notwithstanding the long practice of the bureau, the Comptroller General, in the case of Mabry W. Woodall, held that if a man was permanently and totally disabled at the time he applied for reinstatement of insurance, or conversion of insurance, no matter if he paid the premiums

tive plea in the same suit with a subsequent contract or policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or a part of his insurance in force. This amendment is specifically made retroactive in order that in any case where the claim has been heretofore disallowed on the ground of estoppel, or because of the policy not being incontestable, the insured, or the beneficiary under such contract or policy may,

---

for 10 or 15 years, if the bureau was to administratively then determine that 10 years before he had been permanently and totally disabled at the time he applied, the policy was not incontestable, the statute did not protect it, and the man would have no rights, or his beneficiary would have no rights, whichever was the case.

"This was, of course, an overturning of a practice not only in the bureau, but a practice which obtains with all commercial insurance companies. The very purpose of an incontestable clause is to give some stability to the policies, and while the amendment was not recommended by the bureau, we felt the weight and force of the argument in favor of it.

"The report of the House committee, which accompanied the amendment, stated that it was to protect all policies except in the one class of cases where the veteran was not originally entitled to apply. It is a very drastic provision, more drastic than any commercial contract, because they usually require the payment of premiums for a period of one or two years. The present statute requires it for six months. This amendment, if adopted, would make it incontestable from the moment of acceptance by the bureau, except for fraud or failure to pay premiums."

See also Congressional Record, Vol. 72, pp. 7078, 7082, 7670, 11308, 11465, 11499.

> if he/she so elects, have the benefit thereof. It is contemplated that payments in cases of contracts or policies incontestable under this section will begin from date of maturity of such contracts or policies.

II

THE RESPONDENT WAS NOT ENTITLED TO RECOVER ON HIS ORIGINAL POLICY SINCE HE DID NOT AND COULD NOT SURRENDER HIS CONVERTED POLICY

Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, p. 2, *supra*, provides that:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, * * *

except for matters not here material. That section further provides that the holder of any Government insurance policy—

> may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, *upon surrender of any subsequent contract or policy*, be entitled to payments under the prior contract or policy. (Italics ours.)

The obvious purpose of Section 307, as amended, was to permit an insured, such as the respondent, to sue at his option on either his original term insurance policy or on his converted policy. But if he elects to sue upon his prior term policy, the right to recover is expressly made conditional upon the surrender of

the subsequent converted policy. In the case at bar the respondent, eight years prior to filing suit, had voluntarily returned his converted policy to the Veterans' Bureau and had received in lieu thereof its full cash surrender value. The effect of this action was to extinguish the converted policy and to terminate all rights and obligations of both the insured and the Government under that policy. Joyce, The Law of Insurance, 2d Ed., Sec. 1634; Williston on Contracts, Secs. 1876–1878. See also *Green* v. *Insurance Co.*, 112 Kan. 50; *McCormick* v. *The Travelers Insurance Co.*, 215 Mo. App. 258; *Blackburn* v. *Merchants Life Insurance Co.*, 90 Cal. App. 362. Cf. *Deane* v. *Caldwell*, 127 Mass. 242, 248; *Silva* v. *Bair*, 141 Cal. 599, 603. Accordingly, the respondent was unable at the time of the recovery of judgment in the District Court to comply with the express requirement of the statute by surrendering the converted contract, and, therefore, he was not entitled to recover.

The Circuit Court of Appeals, conceding that "the statute requires a surrender of the subsequent contract as a condition precedent * * * to receiving the payments" under the prior policy, held that if the insured "has already surrendered the [prior] policy there is no occasion to surrender it after the judgment," adding, "nor is it possible to do so." (R. 55.) This conclusion, we submit, does unwarranted violence to the language of the statute and misconceives the essential purpose of the statutory condition.

The word "surrender" means to yield, render, or deliver up. Webster's New International Diction-

ary. See also *Nolander* v. *Burns*, 48 Minn., 13; *Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620. It presupposes, especially when preceded by the word "upon," the possession or ownership of the thing to be surrendered. *Brown* v. *Gibson*, 107 Va. 383, 387. As applied to ordinary insurance it connotes the yielding up of the contract between the parties and the delivery to the insurance company of the policy itself which embodies the contract of insurance. *Goodhue* v. *Hartford Fire Insurance Co.*, 175 Mass. 187, 189; *Blume* v. *Pittsburg Life and Trust Co.*, 263 Ill. 160; *McLaughlin* v. *Equitable Life Assurance Society*, 38 Nebr. 725, 734; *Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620, 623. When judgment was entered in the case at bar the insured had no contract with the Government and did not own or possess the policy of which the statute required surrender as a condition precedent to recovery. We do not think the language of the statute may be satisfied by the fact that several years prior to the suit the respondent had surrendered his converted policy, not for the purpose of claiming rights under his earlier policy, but for the purpose of receiving the benefits of the converted policy.

A more serious error of the court below was its failure, we believe, to give effect to the underlying purpose of the statutory provision. The provision that recovery upon a prior policy should be had only upon surrender of a subsequent policy was not merely a technical, procedural requirement which had as its object the elimination of any possible future claims

upon the later policy. It was the expression of an intention, dictated by obvious reasons of fairness and equality, *that the insured should not have the benefit of both policies.* This purpose is not only apparent from the language of the statute but is unmistakably indicated by the statement in the committee report (p. 13, *supra*) that "Recovery * * * can only be effected upon one of the contracts or policies." The effect of the decision of the courts below is to allow the respondent the benefit of both his original term policy and his subsequent converted policy.[3]

By the converted policy of insurance issued to the respondent the United States undertook to pay to him in the event of his becoming totally and permanently disabled while the policy was in force certain specified monthly payments over a stated period. In the event of his death, while the policy was in force and without his having become totally and permanently disabled, the Government undertook to pay specified amounts of money over a stated period to the beneficiary named in the policy. The Government also covenanted as follows:[4]

> Upon written request therefor by the insured made while this policy is in force

[3] It should be noted that the court below did not remit from the amount of the judgment the amounts paid to the respondent as the cash surrender value of the converted policy. The court thus construes Section 307, as amended, not only to permit recovery upon the original policy but to require the Government to return to the veteran the cash surrender value of the converted policy.

[4] See the respondent's brief in opposition to the petition for certiorari, p. 8. See also the Appendix, *infra*.

> or not later than three calendar months after the due date of the premium in default and *upon complete surrender of this policy with all claims thereunder*, the United States will pay to the insured the cash-surrender value hereof. (Italics ours.)

By making payment in full pursuant to any one of these covenants the Government fully performed its contract. If the respondent became totally and permanently disabled and the Government paid him the stated amounts during the requisite period, the contract was at an end; it no longer operated as a contract of insurance against the *death* of the respondent. Likewise by the "complete surrender" of the policy and "all claims thereunder" in return for the cash surrender value, the obligations of the Government were completely extinguished. Thereby the contract was fully performed as to both parties, and the respondent, having voluntarily elected to accept one of the alternative settlements prescribed by the policy, must be regarded as having received in full the benefits thereof.

Any doubt that, by reason of the surrender of the converted policy for its cash surrender value, the respondent must be held to have received full satisfaction of the Government's insurance undertaking with respect to him is removed by the statute itself. By Section 310 of the World War Veterans' Act, as added to the statute by the Act of May 29, 1928, c. 875, 45 Stat. 970 (U. S. C. Sup. V, Title 38, Sec. 512 (a)), Congress provided that upon application

and upon satisfactory evidence of good health the United States should grant converted insurance "to any person who has heretofore applied or been eligible to apply for yearly renewable term insurance or United States Government life (converted) insurance," with the proviso—

> That no person who has surrendered his United States Government life (converted) insurance for its cash surrender value shall be entitled to apply for insurance under this section to the extent of the amount of the insurance so surrendered.

The significance of this proviso is apparent. It is common knowledge that great numbers of veterans allowed their Government insurance to lapse upon leaving the service. For a considerable period, by repeated extensions of the expiration date, Congress made it possible for such veterans to secure the reinstatement of their insurance upon proof satisfactory to the Director that the applicant was not totally and permanently disabled. (U. S. C., Title 38, Sec. 515.) Finally, by the Act of May 29, 1928, *supra*, Congress made it possible for any person who had ever been eligible for Government insurance, no matter how often he had allowed his insurance to lapse, to secure such insurance upon proof to the Veterans' Bureau of good health. If a veteran has allowed his original insurance to lapse, then has reinstated and converted it, then has allowed his converted insurance to lapse, still, under the provision above quoted, he can secure Government insurance.

The one person otherwise eligible who can not even to-day reinstate his Government insurance *is the one who has surrendered his converted insurance for its cash surrender value.* Congress has thus unmistakably indicated its view that to such a one as the respondent its obligations with respect to insurance are wholly at an end. Accordingly, since the respondent has received the full benefit of his converted insurance, he is precluded from recovery on his original policy.

The court below rested its decision largely upon the ground that the respondent came "within the spirit of the remedial legislation of July 3, 1930," that recovery by the respondent was "in the interest of justice" since under the facts found by the jury "the insured has been paying the government, where, * * * the government should have been paying him." (R. 55.) We submit that such considerations are irrelevant in view of the plain language of the statute. Essentially, we believe, they represent an application of the doctrine of strict construction which ordinarily applies to insurers but which for obvious reasons is not applicable to the Government.

This Court has made it clear that Government war risk insurance is largely a matter of benevolence, that it was entered into at considerable cost to the Government, and that payments under Government insurance policies "include both insurance and pension." *United States* v. *Worley*, 281 U. S. 339, 343; *White* v. *United States*, 270 U. S. 175, 180. Not only is the insurance itself largely a gratuity but

the right to reinstate such insurance when lapsed, of which right the respondent availed himself, is wholly a gratuity. *Meadows* v. *United States*, 281 U. S. 271, 274. And, finally, the very right of the respondent to bring suit in the instant case is founded upon a gratuity. The statute upon which the suit is predicated was enacted upon the assumption that the rights of veterans such as the respondent upon their original term policies had been extinguished by the subsequent reinstatement and conversion of the insurance (p. 12, *supra*.) Under these circumstances the applicable doctrine is not that of strict construction against an insurer, but rather that of the strict limitation of the benefits of a public gratuity to those who can clearly meet the statutory requirements. See *Crawford* v. *United States*, 40 F. (2d) 199, 200 (C. C. A. 2d); *United States* v. *Loveland*, 25 F. (2d) 447 (C. C. A. 3d); *Birmingham* v. *United States*, 4 F. (2d) 508, 509 (C. C. A. 8th).

The precise point involved in the case at bar was considered in *United States* v. *Andrews*, 43 F. (2d) 80 (C. C. A. 10th). There under facts identical with those in the case at bar the court denied the insured the right to recover on his original policy (p. 82)—

> on the ground he cannot now surrender the converted policy since he has enjoyed the benefits of the insurance under it, and it stands as a contract fully performed and executed by the government.

The decision in the *Andrews case* has since been approved by the same court in *Watson* v. *United States*, 45 F. (2d) 589. See also *United States* v. *Crowell*, 48 F. (2d) 475 (C. C. A. 8th); *Quirk* v. *United States*, 45 F. (2d) 631, 639 (W. D. Pa.). The Government, of course, does not question the right of a veteran who has converted his term insurance to sue on his prior policy, even if he has allowed the converted policy to lapse, provided he surrenders the converted policy. *Long* v. *United States*, 45 F. (2d) 590 (C. C. A. 10th); *Sprencel* v. *United States*, 47 F. (2d) 501 (C. C. A. 5th); *Herrig* v. *United States*, 53 F. (2d) 327 (C. C. A. 9th); *United States* v. *Stamey*, 48 F. (2d) 150 (C. C. A. 9th).

While there are no cases involving ordinary life-insurance policies which are precisely in point, a question similar to that here involved has frequently arisen in connection with ordinary life-insurance policies. Covenants similar to those in the respondent's converted policy are not unusual in such policies, and provisions that upon the lapse thereof and *upon the surrender of the policy within a specified time* the company will either pay to the insured the cash-surrender value of the policy or issue a paid-up policy of insurance are not uncommon. In construing such provisions it is held by the great weight of authority, in spite of the doctrine of strict construction, that the delivery or surrender to the company of the policy, strictly in accordance with its terms, is a condition precedent to performance by the insurance company. *Knapp* v. *Homeopathic Mutual Life Insurance Co.*,

117 U. S. 411; *Kothe* v. *Phoenix Mutual Life Insurance Co.*, 269 Mass. 148; *Blume* v. *Pittsburg Life & Trust Co.*, 263 Ill. 160, *supra; McLaughlin* v. *Equitable Life Assurance Society*, 38 Nebr. 725, *supra; Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620, 623, *supra; Collman* v. *Assurance Society*, 133 Iowa 177; *Matter of Attorney General* v. *Continental Life Insurance Co.*, 93 N. Y. 70; *Hilliard* v. *Wisconsin Life Insurance Co.*, 137 Wis. 208; *Universal Life Insurance Co.* v. *Devore*, 88 Va. 778; *Stayner* v. *Equitable Life Assurance Society*, 22 Misc. Rep. 53; *Schumacher* v. *Manhattan Life Insurance Co.*, Fed. Cas. No. 12490 (E. D. Mo.); *Coffey* v. *Universal Life Insurance Co.*, 7 Fed. 301, 307 (Wis.); *Sheerer* v. *Manhattan Life Insurance Co.*, 20 Fed. 886, 889 (Ky.).

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
ROY ST. LEWIS,
Assistant Attorney General.
PAUL D. MILLER,
W. CLIFTON STONE,
Attorneys.

NOVEMBER, 1932.

APPENDIX

The Regulations and Rules of Procedure of the Veterans' Administration, issued pursuant to Section 301 of the World War Veterans' Act, as amended (U. S. C., Sup. V, Title 38, Sec. 512), provide in part as follows:

PLANS OF UNITED STATES GOVERNMENT LIFE INSURANCE

3025. *Ordinary Life Policy.*—The ordinary life policy provides the maximum amount of protection for the minimum premium, which is payable so long as the insured may live, or until he becomes totally and permanently disabled.

FORMS OF POLICIES

3040. The forms of policies of insurance described and designated below, bearing the signature of and now on file in the office of the Administrator of Veterans' Affairs, are hereby prescribed for use in granting United States Government life insurance applied for in accordance with the provisions of the World War veterans' act and amendments thereto. Contracts of insurance are hereby authorized to be made in accordance with the terms and conditions set forth in the forms of policies described and designated below:

Ordinary life policy (Form 741)

* * * * *

Treasury Department Form 741 of the Veterans' Administration, being the Government life insurance

ordinary life policy form, contains the following covenants and conditions, among others:

1. * * *.

* * * * *

If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

* * * * *

3. This policy, if it has not been surrendered for a cash-surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Bureau of War Risk Insurance, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. * * *.

* * * * *

5. Cash-surrender value, paid-up insurance, extended insurance, and policy-loan provisions as follows shall be effective only after premiums for twelve full months have been paid—all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at three and one-half per centum per annum:

(*a*) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default, and upon complete surrender of this policy with all claims thereunder, the United States will pay to the Insured the cash-surrender value hereof. The said cash-surrender value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve, together with

any dividend accumulations left on deposit, less any indebtedness under this policy. For each month within any policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year.

(*b*) If the policy has not been surrendered for a cash-surrender value, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the Bureau of War Risk Insurance will issue paid-up insurance for such amount, payable in one sum at death, as the then cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. * * *.

(*c*) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as Term Insurance payable in monthly installments for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1932

